

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EDITH L. HIZEY

Claimant

VS.

MCI

Respondent

AND

ZURICH U.S. INSURANCE COMPANY

Insurance Carrier

Docket No. 1,014,073

ORDER

Respondent and its insurance carrier (respondent) appealed the April 22, 2004 preliminary hearing Order entered by Special Administrative Law Judge Vincent L. Bogart.

ISSUES

This is a claim for an October 7, 2003 accident, which occurred while claimant was participating in a dance contest on respondent's premises during her normal working hours.

This is the second appeal to the Board in this claim. Respondent first appealed the February 9, 2004 preliminary hearing Order entered by Administrative Law Judge Jon L. Frobish. In that first appeal, respondent raised the following issues: (1) whether claimant's accident arose out of and in the course of her employment with respondent, and (2) whether claimant's need for medical treatment was causally related to her accident.

By Order dated April 30, 2004, the Board determined claimant's accident arose out of and in the course of her employment with the respondent. The Board also determined the Judge did not exceed his jurisdiction in authorizing the health care provider to treat all of the symptoms that were related to the accident.

On April 22, 2004, Judge Bogart entered a preliminary hearing Order awarding claimant temporary partial disability benefits from February 16, 2004, to March 10, 2004, followed by temporary total disability benefits. Respondent initiated this appeal to again raise the issue of whether claimant's accident arose out of and in the course of her

employment with respondent. Respondent believes the Board failed to consider a recent unpublished Kansas Court of Appeals decision when it decided the earlier appeal as the Board failed to specifically address that decision in its Order.

The only issues on this appeal are:

1. On an appeal from a later preliminary hearing order, should the Board review one of its earlier preliminary hearing findings when no new evidence was introduced regarding that issue at the later hearing?
2. If so, did claimant's accident arise out of and in the course of her employment with respondent?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' arguments, the Board finds and concludes this appeal should be dismissed.

Respondent raises the issue of whether claimant's accident arose out of and in the course of her employment with respondent or whether the accident occurred during a recreational or social event. Respondent recognizes the Board addressed that issue in its earlier April 30, 2004 Order. But respondent believes the Board failed to consider a recent unpublished Kansas Court of Appeals decision.¹ Accordingly, respondent requests the Board to follow the analysis set forth in the unpublished decision and conclude claimant's accident is not compensable under the Workers Compensation Act.

Only those accidents that arise out of and in the course of a worker's employment are compensable under the Workers Compensation Act.² The Act also excludes accidents that occur while a worker is engaged in some, but not all, recreational and social events.

The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.³

¹ *McIntosh v. City of Wichita*, No. 90,921 (Kansas Court of Appeals Apr. 2, 2004) (unpublished opinion).

² K.S.A. 44-501(a).

³ K.S.A. 2003 Supp. 44-508(f).

According to that statute, accidents that occur during recreational and social events may be construed to arise out of and in the course of employment when the worker is required to attend, the injury results from performing tasks related to the worker's regular job duties, or the injury results from performing tasks the employer specifically instructed the worker to perform.

Whether claimant's accident arose out of and in the course of her employment is a question of fact. The Board carefully considered respondent's arguments in the initial appeal and held that claimant's accident arose out of and in the course of her employment with respondent. Moreover, before issuing its April 30, 2004 Order, the Board considered the unpublished decision cited by respondent. Respondent's April 16, 2004 letter to the Board, which included a copy of the unpublished decision, was received in the Board's office 11 days before the April 30, 2004 Order was released.

As there is no new evidence at this time for the Board to consider regarding the issue of compensability, the Board's April 30, 2004 Order is res judicata. Respondent, however, is not without a remedy as it may reserve this issue for additional consideration at the time of final award when preliminary hearing findings are subject to review and may be modified.⁴

WHEREFORE, the Board dismisses respondent's appeal. The April 22, 2004 preliminary hearing Order entered by Special Administrative Law Judge Vincent L. Bogart remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of June 2004.

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Kim R. Martens, Attorney for Respondent and its Insurance Carrier
Vincent L. Bogart, Special Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁴ K.S.A. 44-534a(a)(2).